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In the Supreme Court of the United States

October Term, 1985

UNITED FOOD & COMMERCIAL WORKERS,
LOCAL 626,
Petitioner,

vs.

THE KROGER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Where a collective bargaining agreement contains an agreed upon clause which requires the employer to bind its successors to the terms of the labor contract if the business is sold or otherwise transferred; and, where the union files a grievance in response to the employer's actions which threaten a breach of the successors clause; may the union obtain injunctive relief under *Boys Markets, Inc. v. Retail Clerks Union*[1] to enjoin the transfer of the employer's business pending resolution of the grievance through arbitration?

2. Should a reverse *Boys Markets* injunction be issued to protect the integrity of the grievance-arbitration clause itself, thus preserving the public policy favoring resolution of labor disputes through arbitration?

3. Where a federal district court refuses to enjoin an employer's impending breach of a collective bargaining agreement's successors clause, does the damage to the arbitral process constitute irreparable harm to the union?

4. In a union's action for an injunction to prevent the breach of a collective bargaining agreement pending arbitration, may a district court find "a likelihood of success" on the merits of a union's grievance when the court has not permitted the introduction of evidence going to the merits of said grievance?

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1. 398 U.S. 235 (1970).

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No.

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vs.

THE KROGER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Now comes United Food & Commercial Workers, Local No. 626, by and through its attorneys, the law offices of Gallon, Kalniz & Iorio Co., LPA, and prays that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the Opinion of said Court.

OPINIONS OF THE COURTS BELOW

The December 10, 1985 Opinion of the United States Court of Appeals for the Sixth Circuit is reproduced at page A1 of the Appendix hereto. The opinion of the Court of Appeals has also been published at 120 L.R.R.M. 3550 (6th Cir. 1985). The October 23, 1984 Order of the

United States District Court for the Northern District of Ohio, Western Division, with Findings of Fact and Conclusions of Law, is reproduced at page A14 of the Appendix hereto.

JURISDICTION

On December 10, 1985, the United States Court of Appeals for the Sixth Circuit entered judgment affirming the decision of the United States District Court for the Northern District of Ohio, Western Division. *See* App. pp. A1 and A27. The Court of Appeals denied a timely petition for rehearing on January 29, 1986. *See* App. p. A28. Consistent with 28 U.S.C. §2101(c) and Rule 20.2 of the Supreme Court Rules, the instant Petition for a Writ of Certiorari has been filed within ninety (90) days of the denial of the petition for rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(a). The federal jurisdiction of the district court below was invoked pursuant to 28 U.S.C. §1331; 28 U.S.C. § 1337; §301 of the Labor-Management Relations Act of 1947, *as amended,* 29 U.S.C. §185; 28 U.S.C. §2201; 28 U.S.C. §2202; and Rule 65 of the Federal Rules of Civil Procedure. This action arose as a request for injunctive and monetary relief to redress the Kroger Company's (hereinafter referred to as the "Company" or "Kroger") breach of its collective bargaining agreement with Local No. 626 of the United Food & Commercial Workers (hereinafter referred to as the "Union" or "Local 626").

STATUTORY PROVISIONS INVOLVED

The instant petition raises questions of law involving the Norris-LaGuardia Act, 29 U.S.C. §104, and Section 301 of the Labor-Management Relations Act of 1947, *as amended,* 29 U.S.C. §185. *See* App. pp. A30 and A31.

STATEMENT OF THE CASE

The facts giving rise to the instant Petition can be simply stated. The following outline incorporates the factual findings of both the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Northern District of Ohio, Western Division. *See* App. p. A14. The Union and the Company are and have at all relevant times been signatory to a collective bargaining agreement, the most recent of which is effective from October 30, 1984 through October 25, 1986. *See* App. p. A33. The agreement establishes the Union as the exclusive representative for all employees in the meat and seafood departments of the Company's Northwest Ohio stores. *See* App. p. A36. In July, 1984, the Company sought contract concessions with regard to its three (3) stores in the Lima, Ohio area. *See* App. p. A16. Although the Union, in reply, proposed significant concessions, the Company stated its intent to close the three (3) Lima, Ohio stores by September 26, 1984 if the Company's own proposal was not immediately ratified by the Union's membership. On or about September 22, 1984, the Company closed the three (3) Lima, Ohio stores, thus permanently eliminating approximately twenty-three (23) bargaining unit jobs. *See* App. pp. A16 and A17.

Subsequent to the closing of the Lima, Ohio stores, the Union dispatched two (2) telegrams to the Company requesting notice of any impending sale or transfer of the stores, and seeking the Company's assurance that the successors clause contained in the collective bargaining agreement would be honored. *See* App. pp. A51 and A53. The successors clause is found in the Preamble of the contract between the parties, and provides that the agreement is between the Company, "its successors and assigns", and the Union. *See* App. pp. A19 and A36.

The contract between the Union and the Company also includes a grievance procedure for the resolution of disputes. *See* App. p. A38. The grievance procedure ends in final and binding arbitration. On September 27, 1984, the Union invoked this procedure by filing a grievance protesting any transfer of the Lima, Ohio stores in violation of the contract's successors clause. *See* App. p. A49. The Union further offered to expedite the processing and arbitration of this grievance in order to minimize the risk of negative impact to either party. *See* App. pp. A20-A21.

On September 28, 1984, the Company responded to the Union's two (2) telegrams of September 26, 1984, and to the Union's September 27, 1984 grievance. *See* App. p. A55. The Company informed the Union that it had no intention of abiding by the successors and assigns clause and that information would be provided to the Union only after the Lima, Ohio stores were sold. The Company further refused to recognize the grievance filed pursuant to the collective bargaining agreement and notified the Union that it would not agree to expedited arbitration and that it would not process or arbitrate the Union's grievance at all.

The case below was commenced on October 2, 1984, when the Union filed suit in the United States District Court for the Northern District of Ohio, Western Division, alleging a violation of the grievance and arbitration procedure contained in the collective bargaining agreement between the parties and a violation of §301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185. *See* App. pp. A31 and A32. The Union sought a status quo injunction preventing the Company from selling or otherwise transferring its three (3) Lima, Ohio stores prior to the expedited arbitration of the September 27, 1984

grievance. The District Court granted the Union's request for arbitration, but denied the injunction against the sale of the stores pending arbitration. *See* App. pp. A14 and A24. The Union unsuccessfully moved both the District Court and the Court of Appeals for an injunction during the pendency of appeal. *See* App. pp. A12 and A25-26. The Lima, Ohio stores were sold during the pendency of the Appeal.

On December 10, 1985, the Court of Appeals affirmed the District Court's denial of injunctive relief. *See* App. p. A27. The Union filed a Petition for Rehearing with Suggestion for Rehearing *En Banc* on December 24, 1985. Both the Petition for Panel Rehearing and the Suggestion for Rehearing *En Banc* were denied on January 29, 1986. *See* App. p. A28. Upon the Union's motion, the Court of Appeals issued an Order on February 29, 1986 staying the mandate in the instant action pending the timely filing of the Union's Petition for a Writ of Certiorari. *See* App. p. A29. For the reasons that follow, the Union's Petition for a Writ of Certiorari should be granted, and the Sixth Circuit's affirmation of the District Court's denial of injunctive relief should be considered anew by this Court.

REASONS FOR GRANTING THE WRIT

Introduction

The opinion of the Court of Appeals below dealt with two primary issues. The first was whether a reverse *Boys Markets* injunction should issue to enforce the successors clause and the grievance arbitration clause of the collective bargaining agreement between the parties. *See* App. p. A10. The second was whether the above question had been rendered moot by the Company's sale of the

stores while the appeal was pending. *See* App. p. A7. The Petitioner does not take exception to the Court of Appeals' findings with respect to mootness. The Court of Appeals accurately characterized the case at bar as "capable of repetition . . . yet evad[ing] review," thus presenting a justiciable controversy.[2] *See* App. p. A10. This petition for a writ of certiorari focuses upon the core issue of this suit—the appropriateness of the reverse *Boys Markets* injunction as a means of maintaining the status quo pending arbitration.

The so-called *"Boys Markets"* injunction arose as an exception to the provisions of the Norris-LaGuardia Act, 29 U.S.C. §104. *See* App. p. A30. The Norris-LaGuardia Act provides that no injunction shall issue in cases involving or growing out of labor disputes. In *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970), this Court carved out a narrow exception permitting injunctive relief where essential to the enforcement of the parties' agreement to arbitrate contract disputes. 398 U.S. at 247-49. In qualifying the anti-injunction policy of Norris-LaGuardia, this Court noted:

> The literal terms of §4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of §301(a) of the Labor Management Relations Act and the purposes of arbitration. Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

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2. *See Weinstein v. Bradford,* 423 U.S. 147 (1975); *Johansen v. San Diego County Council of Carpenters,* 117 L.R.R.M. 3028 (9th Cir. 1984).

See Boys Markets, 398 U.S. at 250 (citations omitted). Within the "total corpus" of the law governing collective bargaining agreements:

> the unavailability of equitable relief in the arbitration context presents a serious impediment to the congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes . . . .

See Boys Markets, 398 U.S. at 253. Thus, paradoxically, there are certain circumstances under which the issuance of an injunction is the only method of promoting the policy underlying the Norris-LaGuardia Act. *See Boys Markets,* 398 U.S. 235 at 251-52. Simply stated, in certain situations, the lack of an injunction "could do more to undermine faith in the arbitral process than a strictly enforced anti-injunction policy would to promote it". *See Aluminum Workers v. Consolidated Aluminum Corp.,* 696 F.2d 437, 441 (6th Cir. 1982).

To govern situations in which the continued viability of an agreed upon arbitration clause was in jeopardy, this Court established the following prerequisites to injunctive relief:

> 1. A controversy must exist involving or growing out of a labor dispute within the meaning of §4 of the Norris-LaGuardia Act;
>
> 2. A full evidentiary hearing must be held;
>
> 3. The court must find that the underlying dispute is subject to binding arbitration according to the terms of the collective bargaining agreement; and
>
> 4. The movant must establish the following traditional equitable basis for relief:

a. likelihood of success upon the merits;

b. that the movant will suffer irreparable harm absent injunctive relief;

c. that the balance of the hardships tips in favor of the movant.

See Boys Markets, 398 U.S. at 254-55; *Auto Workers v. Lester Engineering Co.*, 718 F.2d 818, 822 (6th Cir. 1983). As initially conceived, the *Boys Markets* exception contemplated a situation in which a strike ensues over an arbitrable grievance. *See* 398 U.S. at 253. An injunction issued against the union would serve to halt the strike pending resolution of the grievance through arbitration, thus encouraging peaceful dispute resolution mechanisms. *See* 398 U.S. at 253-254.

The equitable relief sought in the case at bar is known as the "reverse" *Boys Markets* injunction, a variation which has emerged through numerous courts' interpretations of the premise underlying the *Boys Markets* exception. *See e.g. Local 434 v. Sky-Vue Terrace*, 119 L.R.R.M. 2097, 759 F.2d 1094 (3rd Cir. 1985); *Aluminum Workers v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982); *Auto Workers v. LaSalle Machine Tool, Inc.*, 696 F. 2d 452 (6th Cir. 1982); *I.A.M. Lodge 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981); *Columbia Local, American Postal Workers Union v. Bolger*, 621 F.2d 615 (4th Cir. 1980); *United Steelworkers v. Fort Pitt Steel Casting*, 598 F.2d 1273 (3rd Cir. 1979); *Amalgamated Union, Division 1384 v. Greyhound Lines, Inc.*, 529 F.2d 1073 (9th Cir.) *vacated and remanded*, 429 U.S. 807 (1976), *reversed*, 550 F.2d 1237 (9th Cir.) *cert. denied*, 434 U.S. 837 (1977); *Lever Brothers Co. v. International Chemical Workers Union, Local 217*, 554 F.2d 115 (4th Cir. 1976); *Hoh v.*

Pepsico, 491 F.2d 556 (2d Cir. 1974). The philosophy of the reverse *Boys Markets* exception was best described in the Sixth Circuit's opinion in *Aluminum Workers*:

> Although *Boys Markets* involved employee violation of a no-strike clause, unilateral action by employers may have an equally pernicious effect on the arbitral process. Therefore, the courts have extended the *Boys Markets* exception to embrace employer behavior which has the effect of evading a duty to arbitrate or which would otherwise undermine the integrity of the arbitral process. (citations omitted)

See 696 F.2d at 441. As stated more succinctly in *Panoramic Corp.*:

> [T]he rule respecting injunctions in aid of arbitration is a 'two-sided coin.'

See 668 F.2d at 280, *quoting, Lever Brothers,* 554 F.2d at 123. The following brief discussion will demonstrate that the decision below is in direct conflict with identical decisions in the Seventh, Fourth, Third and Eighth Circuits, and will further demonstrate that the District Court misapplied the *Boys Markets* standards for injunctive relief.

I. THE DECISION OF THE SIXTH CIRCUIT BELOW IS IN DIRECT CONFLICT WITH THE SEVENTH CIRCUIT'S DECISION ON IDENTICAL FACTS, AND IS FURTHER CONTRARY TO RULINGS OF THE THIRD, FOURTH AND EIGHTH CIRCUITS

The Sixth Circuit's ruling herein is in direct conflict with decisions rendered by the Seventh, Fourth, Third and Eighth Circuits. Although the Sixth Circuit has adopted

the policies underlying the *Boys Markets* and reverse *Boys Markets* injunction, it would not award injunctive relief when clearly called for in the facts at bar. Three notable Sixth Circuit cases have acknowledged the appropriateness of an injunction against an employer pending arbitration. *See Auto Workers v. Lester Engineering Co.*, 718 F.2d 818 (6th Cir. 1983); *Aluminum Workers v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982); *Auto Workers v. LaSalle Machine Tool, Inc.*, 696 F.2d 452 (6th Cir. 1982). In each of these cases the Sixth Circuit has accepted the premise that an employer may be enjoined from committing acts which will render arbitration meaningless. *See LaSalle Machine Tool, Inc.*, 696 F.2d at 457, *see also Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872 (6th Cir. 1972) *cert. denied*, 411 U.S. 967 (1973). The Sixth Circuit has also adopted the liberal standard for arbitrability, which requires only that the position espoused at arbitration be "sufficiently sound to prevent the arbitration from being a futile endeavor". *See Aluminum Workers*, 696 F.2d at 442, n.2, *citing, Panoramic Corp.*, 669 F.2d at 284-85 and *Lever Brothers*, 54 F.2d at 120. *Cf. Hoh v. Pepsico*, 491 F.2d 556 (2d Cir. 1974).

In the case giving rise to the instant petition, all four (4) prerequisites for injunctive relief are squarely met. The successors clause, by its nature, evades enforcement through traditional arbitral remedies. The Sixth Circuit's refusal to enforce a bargained for successors clause by means of an injunction poses a significant threat to the continued viability of such clauses. The facts at bar demand injunctive intervention. The Sixth Circuit, ignoring this demand, has not only failed to follow its own precedents concerning the appropriateness of injunctions

in aid of arbitration, but has also perpetuated the existing conflict among the Circuits on this issue.[3]

In direct conflict with the Sixth Circuit's reluctance to find the elements warranting a reverse *Boys Markets* injunction, the Seventh Circuit has enjoined employer behavior in contravention of the collective bargaining agreement. In *I.A.M. Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981), the Seventh Circuit was faced with facts directly parallel to the facts giving rise to the instant petition. The Panoramic Corporation had arrived at a decision to sell its Sintered Specialties Division, placing one hundred thirteen (113) jobs in jeopardy. The contract between Panoramic and its union contained a successors clause providing:

> THIS AGREEMENT was made and entered into this 1st day of July 1979, by and between the PANORAMIC CORPORATION, its successors and assigns, of Janesville, Wisconsin (hereinafter referred to as the "Company") and LOCAL LODGE NO. 1266 of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS AFL-CIO (hereinafter referred to as the "Union").

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3. Two recent decisions within the Sixth Circuit have properly applied the policies underlying *Boys Markets* to cases involving successors disputes. The case of *Wood v. General Teamsters Local 406*, 603 F. Supp. 992 (W.D. Mich. 1985), presently on appeal to the Sixth Circuit, upheld the enforceability of successors clauses in general, and addressed the inadequacy of arbitration alone as a remedy for the employer's breach of a successors clause. *See* 603 F. Supp. at 1002. In *Anderson v. Ideal Basic Industries*, 120 L.R.R.M. 2039 (D.C. Tenn. 1983) the Tennessee District Court confirmed a company's obligation to the bargaining unit as a whole under the contract's successors clause and upheld the validity of a close out agreement, noting in *dicta* the union's right and responsibility to enforce successorship clauses. *See* 120 L.R.R.M. at 2050-51.

See 668 F.2d at 278, n.3. This successors clause in *Panoramic Corp.* is virtually identical to the clause contained in the agreement between the Kroger Company and Local 626. *See* App. p. A36. The collective bargaining agreement in *Panoramic Corp.* also contained a broad grievance resolution procedure permitting the arbitration of any "dispute or difference of opinion between the Company and the Union as to the meaning and interpretation of a particular provision hereof." *See* 668 F.2d at 278, n.2. This broad contractual agreement as to arbitrability is also found in the Kroger/Local 626 grievance resolution procedure. *See* App. p. A38.

In *Panoramic Corp.*, the union was awarded an injunction against the employer to prevent the sale of corporate assets pending arbitration of the union's claim that the sale would violate the successors clause contained in the collective bargaining agreement. The Seventh Circuit upheld the award of injunctive relief, adopting this Court's reasoning in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). In *Howard Johnson*, a union failed to seek an injunction prior to the company's sale of its assets and, as a result, was left with no remedy against the new owner once the transfer had been consummated. This Court, recognizing the inadequacy of arbitration unaccompanied by an injunction advised:

> The Union apparently did not explore another remedy which might have been available prior to the sale, i.e., moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the [company] of the collective-bargaining agreement.

See 417 U.S. at 258, n.3; *see also Panoramic Corp.*, 668 F.2d at 277, n.1. The injunctive relief alluded to in *Howard*

Johnson would presumptively issue pursuant to the standards set forth in *Boys Markets*.

The remedy suggested by this Court in *Howard Johnson*, and adopted by the Seventh Circuit in *Panoramic Corp.*, recognizes the futility of any attempt to pursue a remedy against a new owner once a company completes any sale or lease of its facilities.[4] Once a sale is consummated, the company cannot be forced to comply with an arbitrator's award upholding the successors and assigns clause. Similarly, the successor cannot be compelled by an arbitrator to abide by the substantive terms of a collective bargaining agreement which it has not, as a condition of purchase, adopted.

The problems of enforcement posed by successorship clauses best illustrate the need for injunctive relief pursuant to the reverse *Boys Markets* theory. When a Union files a grievance involving interpretation of successors and assigns language, the desired remedy is an order conditioning any sale of the business upon the purchaser's adoption of the collective bargaining agreement. Such an order is useless, however, if the employer has not been enjoined from selling, and in fact sells, his business prior to the issuance of the arbitrator's award. Therefore, without an injunction, a union has no means of fully enforcing the protection afforded bargaining unit members by successors and assigns language. Further, the union loses the benefit of its bargain to arbitrate over the disputed successors language. The employer is permitted to circumvent its ob-

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4. *Howard Johnson* has recently evolved a progeny of duty, rendering a union's failure to pursue company violations of successors clauses a breach of the duty of fair representation. *See e.g. Smegal v. Gateway Foods*, 119 L.R.R.M. 2849 (8th Cir. 1985); *Wood v. General Teamsters Local 406*, 603 F. Supp. 992 (W.D. Mich. 1985).

ligations with respect to successors and assigns, thus rendering the clause meaningless.

The Seventh Circuit, when presented with contract language identical to that found in the contract between the Kroger Company and Local 626, did not hesitate to grant the requested injunctive relief. *See* 668 F.2d at 291. The Seventh Circuit's opinion in *Panoramic* cannot be reconciled with the Sixth Circuit's refusal to acknowledge the appropriateness of the reverse *Boys Markets* injunction with respect to the facts at bar.

The decision of the Sixth Circuit herein also stands in direct conflict with the position of the Third Circuit. The Third Circuit recently upheld an award of injunctive relief under *Boys Markets* to prevent an employer from avoiding its promise to arbitrate disputes arising out of successors and assigns language. *See Local 434 v. Sky-Vue Terrace,* 759 F.2d 1094 (3rd Cir. 1985). The Third Circuit further recognized the inadequacy of money damages as the sole remedy for an employer's breach of the collective bargaining agreement's successors clause. The Third Circuit properly focused the inquiry into irreparable harm as the harm that the Union would suffer in the event the employer is permitted to "escape its contractual promise to arbitrate disputes over interpretation of the collective bargaining agreement." *See* 759 F.2d at 1099. Equally important, the Third Circuit upheld the liberal standard of arbitrability urged by *Panoramic Corp.*, acknowledging that:

> [to] hold the union to a stricter standard of proof would intrude significantly on the arbitrator's function, and result in the type of judicial preemption of the arbitral process condemned by the Court in *Buffalo*

> *Forge* [*Co. v. United Steelworkers of America*], 428 U.S. 397, 410-11 (1976).

See Sky-Vue, 759 F.2d at 1098, n.3.

The Sixth Circuit's ruling herein is also in direct conflict with the Fourth Circuit's position on enjoining an employer's breach of the collective bargaining agreement. In *Lever Brothers Co. v. International Chemical Workers Union*, 554 F.2d 115 (4th Cir. 1976), the Fourth Circuit held that a "runaway employer":

> could be enjoined pending resolution of arbitration, notwithstanding his motives, where failure to enjoin could render the arbitration process a "hollow formality."

See 554 F.2d at 123, *see also Drivers, Chauffeurs, Etc. v. Akers Motor Lines*, 582 F.2d 1336 (4th Cir. 1978). The Fourth Circuit has promoted the goal of preserving the viability of the arbitral process by issuing injunctive relief in situations wherein "any victory by the union at the arbitration table may be meaningless." *See Akers Motor Lines*, 582 F.2d at 1341. The facts giving rise to the instant petition clearly fall within the Fourth Circuit's standard, yet the Sixth Circuit left Local 626 with only the hollow formality of arbitration.

The Sixth Circuit's holding herein further conflicts with an Eighth Circuit decision, *Smegal v. Gateway Foods*, 119 L.R.R.M. 2849 (8th Cir. 1985). Therein, the Eighth Circuit upheld the arbitrability of successorship grievances and disallowed a lower court's decision condoning the arbitrary and perfunctory handling of such grievances. While *Smegal* did not deal with the successorship issue in the context of a union request for injunctive relief, the Eighth Circuit's decision is indicative of the growing

trend toward imposing upon unions the duty to aggressively advocate bargaining unit members' rights under successorship clauses. *See* 119 L.R.R.M. at 2850. This duty has emerged in several recent fair representation suits. *See* note 4, *supra*. This affirmative duty to enforce the successorship clause echoes this Court's holding in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra,* wherein it was suggested that the union move to enjoin the employer's impending sale of its business under a breach of contract theory. *See Howard Johnson,* 417 U.S. at 258, n.3.

Like the Sixth Circuit, the Ninth Circuit has taken a restrictive and unworkable approach to the *Boys Markets* exception. In *Amalgated Union, Division 1384 v. Greyhound Lines, Inc.*, 550 F.2d 1237 (9th Cir. 1977), ("Greyhound II"), the Ninth Circuit drew an artificial distinction between injunctions sought by the company to halt a strike and injunctions sought by the union to prevent the employer from altering the status quo. While conceding that the "duty not to strike may be 'essential to carry out promises to arbitrate' ", the Ninth Circuit maintained that "ordinarily there will exist no such necessity to imply a duty to preserve the status quo." *See* 550 F.2d at 1239. In short, the Ninth Circuit is of the opinion that:

> [a] strike pending arbitration generally will frustrate and interfere with the arbitral process while the employer's altering the status quo generally will not.

See 550 F.2d at 1238-39. The artificial distinction imposed by the Ninth Circuit invites judicial manipulation of the four part *Boys Markets* test. The Ninth Circuit will not imply a duty to preserve the status quo unless it can be shown, if the union prevails, the situation could not be

"restored substantially to the status quo *ante*." *See* 550 F.2d at 1239.[5] This vague standard invites the courts to latch onto the availability of an arbitrator's award of monetary damages in order to avoid the difficult equitable questions involved in determining irreparable harm and the balancing of hardships.

If a reverse *Boys Markets* injunction is warranted under any circumstances in the realm of labor law, then it is certainly warranted in the facts at bar. As a result of the lower court's decision, the Union is left with only the meaningless ritual of arbitration unaided by the force of an injunctive decree. The arbitrator is presented with a *"fait accompli"* and cannot successfully bind either the previous employer or its successor to the terms of the collective bargaining agreement. *See Panoramic Corp.*, 668 F.2d at 282-83. The Company remains free to demand contractual concessions at will and wield the threat of closing and/or selling stores. Further, the Company can evade its contractual obligations under the successors and assigns clause in the event of a sale by merely failing to bind its successor. This threat is particularly insidious where, as here, the employer is a large company with numerous stores or branch units which can be selectively sold in order to avoid the burdens of individual collective bargaining agreements.

The actively bargained-for successors clause is therefore rendered meaningless and unenforceable as long as the Company is not enjoined against consummating a sale prior to the outcome of arbitration. When arbitration, the

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5. In *Executive Board v. Royal Center*, 119 L.R.R.M. 2959 (9th Cir. 1985), the Ninth Circuit appeared to make some headway with respect to upholding the arbitrability of successors clauses, however, the case in which that question arose did not involve a plea for injunctive relief.

Union's only means of enforcing the collective bargaining agreement, is eroded to this extent, the contract itself is weakened. The longstanding federal policy favoring arbitration cannot be advanced under such conditions. It is precisely this sort of dispute—one in which a party to a contract cannot obtain its full contractual remedy without an injunction—that the Supreme Court anticipated in creating the narrow *Boys Markets* exception to the Norris-LaGuardia Act. This Court has specifically suggested injunctive relief to aid unions in the enforcement of successors clauses. *See Howard Johnson, supra,* 417 U.S. at 258, n.3.

As the foregoing discussion clearly demonstrates, the Circuits are not in agreement as to the appropriateness of injunctive relief to enforce contractual successors and assigns language. The remedy of injunctive relief outlined in *Boys Markets* is not being consistently interpreted throughout the Circuits. As a result of this confusion, the Sixth Circuit has ruled in direct conflict with the Seventh Circuit's decision in *Panoramic Corp.*—a factually identical case. A writ of certiorari should therefore issue to the United States Court of Appeals for the Sixth Circuit, in order that this Court may clarify the terms and conditions under which a reverse *Boys Markets* injunction may issue to enforce contractual successorship language and to preserve the viability of grievance arbitration procedures.

II. THE DECISION OF THE SIXTH CIRCUIT BELOW PRESENTS AN IMPORTANT ISSUE OF LAW IN THAT IT CALLS INTO QUESTION THE PROPER APPLICATION OF THE STANDARDS FOR INJUNCTIVE RELIEF UNDER BOYS MARKETS

Arbitration is firmly established as the preferred method of industrial dispute resolution. *See United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The *Boys Markets* and reverse *Boys Markets* injunctions are similarly established as methods for enforcing arbitration. The prerequisites for injunctive relief, however, are widely misinterpreted by the circuit courts; particularly the standards for arbitrability, likelihood of success on the merits, irreparable harm, and balancing of the hardships. The Sixth Circuit misapplied each of the above standards in the case below.

In the context of status quo injunctions success upon the merits refers to the arbitrability of the dispute underlying the grievance. *See Aluminum Workers*, 696 F.2d at 422, n.2. Success on the merits clearly does *not* refer to the actual likelihood that the grievance itself will succeed at arbitration. *See Aluminum Workers*, 696 F.2d at 422, n.2, *citing, Panoramic Corp.*, 668 F.2d at 284.

In the case at bar, the District Court erroneously denied injunctive relief based upon its application of the seldom used and seriously eroded standard of the Second Circuit, enunciated in *Hoh v. Pepsico*, 491 F.2d 556 (2d Cir. 1974): *cf. Panoramic Corp.*, 668 F.2d at 284. The *Hoh* standard provides that a grievance, if "arguably arbitrable [yet] plainly without merit, does not satisfy the

likelihood of success requirement." *See* 491 F.2d at 561. The District Court compounded this error by predetermining the merits without allowing the presentation of evidence that would permit a fair and sound decision. The Court of Appeals likewise erred in failing to correct the District Court's mischaracterization of the proper factors for evaluating the likelihood of success upon the merits.

The proper standard for determining the likelihood of success upon the merits has been adopted by the Fourth, Sixth, Seventh and Ninth Circuits and provides:

> [A] plaintiff . . . seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Markets* . . . need only establish that the position he will espouse at arbitration is *sufficiently sound to prevent arbitration from being a futile endeavor.* (emphasis added)

See Aluminum Workers, 696 F.2d at 442, n.2; *accord Panoramic Corp.,* 668 F.2d at 284; *Lever Brothers Co.,* 554 F.2d at 120; *Amalgamated Union, Division 1384 v. Greyhound Lines, Inc.,* 529 F.2d 1073, 1077-78 (9th Cir.) *vacated and remanded,* 429 U.S. 807 (1976), *reversed,* 550 F.2d 1237 (9th Cir.) *cert. denied,* 434 U.S. 837 (1977). Under this standard, futility is the only question. The only way that a grievance would be "futile" would be if it were not in fact arbitrable. In the *Steelworkers* trilogy, this Court described the literal parameters for arbitrability:

> An order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.

See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 582-83. In view of this Court's liberal definition of arbitrability, a grievance can be "futile" only

if it is not arbitrable. Therefore, absent minimal finding of non-arbitrability, all arbitrable disputes satisfy the necessary requirement of likelihood of success upon the merits.

Although the Sixth Circuit itself has adopted the "sufficiently sound" standard, the Court of Appeals inexplicably refused to correct the District Court's improper use of the *Hoh* standard in the case below. In view of the deeply held policies comprising the foundation of federal labor law, the defects in the *Hoh* standard are obvious. As this Court noted in the *Steelworkers* trilogy, a judicial determination of whether a dispute is "without merit" violates the very essence of federal labor policy:

> The function of the Court is very limited . . . . It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . .
>
> The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim.

See United Steelworkers v. American Mfg. Co., 363 U.S. at 567-68; *see also United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. at 599. In a very recent decision, this Court has upheld the limited judicial task of determining arbitrability by stating:

> [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.

See A T & T Technologies, Inc. v. Communications Workers of America, 54 U.S.L.W. 4339, 4341 (April 7, 1986).

The Second Circuit's *Hoh* standard invites judicial intervention into the labor dispute resolution process in direct contravention of the preference for arbitration. The Seventh Circuit has aptly characterized the *Hoh* standard as a "significant intrusion" upon the arbitrator's function and an improper pre-emption of the arbitral process by the judiciary. When applied in the context of labor injunctions, the *Hoh* standard requires the reviewing court "to do precisely what the policies involved in our national labor laws . . . command it not to do—encroach upon the arbitrator's domain by predetermining the merits of the dispute." *See Aluminum Workers*, 696 F.2d at 422, n.2, *citing, Panoramic Corp.*, 668 F.2d at 284. The District Court's resurrection of the literal *Hoh* standard, left uncorrected by the Sixth Circuit, perpetuates further vitiation of the arbitral process and imposes excessive fact finding burdens upon the judiciary.

Further compromising the Union's remedy at arbitration, the Court of Appeals upheld the District Court's improper focus of the issue of irreparable harm. *See* App. pp. A22 and A24. Contrary to the District Court's findings, the permanent loss of jobs by Union members is not the total extent of the irreparable harm in the case at bar.[6] The substantial irreparable harm is the damage to the arbitral process itself. The Sixth Circuit, in *Aluminum Workers*, defined irreparable harm as:

> injury so great that an arbitrator's award, if forthcoming, would be inadequate to fully recompense the

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6. In *Panoramic*, however, the Seventh Circuit has indicated that a damage remedy alone is inadequate to compensate employer action threatening a permanent loss of jobs. *See Panoramic*, 668 F.2d at 286.

> injured party. It renders the award an "empty victory" . . . and thereby undermines the integrity of the arbitral process as thoroughly as did the union's violation of the no-strike clause in *Boys Markets*.
>
> [I]t is this very "frustration or vitiation of arbitration" which justified the "narrow exception" to the anti-injunction provision of the Norris-LaGuardia Act.

See Aluminum Workers, 696 F.2d at 443.

Irreparable harm is therefore not a question of whether monetary damages will serve as adequate compensation. It is, more accurately, a question of whether the Union has lost its bargained-for right to grieve the Company's contract violations to a meaningful resolution. The Court of Appeals affirmed, without discussion, the District Court's erroneous contention that irreparable harm is merely a question of the availability of monetary damages. *See* App. p. A11.

The Court of Appeals further erred in upholding the District Court's finding that the Company's desire to sell its stores prior to the peak grocery season somehow justified the Company's breach of the successors clause. *See* App. pp. A18 and A19. The District Court gave great weight to the Company's speculative projection of losses that would allegedly result from a delayed sale of the Lima, Ohio stores. As a result, the balancing of the respective hardships concurrent with the issuance or non-issuance of an injunction was found to tip in favor of the Company. The "substantial economic harm" to the Kroger Company should not have been a concern of either the District Court or the Court of Appeals. In the case at bar, as in all cases involving a request for injunctive relief, the obligatory bond would have been posted by the Union.

Notwithstanding the posting of a bond, potential economic loss to the Company is not decisive in determining the Company's obligation to arbitrate alleged violations of the collective bargaining agreement. Both the District Court's opinion and the Court of Appeals' affirmation ignore the fact that the Company agreed to the language contained in the contract, and must either abide by it or arbitrate its failure to do so through the contract's grievance arbitration procedure. By agreeing to the successors clause, the Company effectively bargained away the right to transfer its stores at will to any available purchaser. By virtue of the successors clause, the Company also agreed to be accountable to the Union, under the grievance arbitration procedure, should it fail to properly bind its successors. The Company's obligation to arbitrate is paramount, and the Company's speculative projected losses do not tip the balance against the preservation of the arbitral forum.

In creating a precedent which clearly deviates from the legislative intent giving rise to the Norris-LaGuardia Act, as well as the standards set in the *Boys Markets* and *Panoramic Corp.* decisions, the Sixth Circuit denied the applicability of *Boys Markets* to the facts at bar. The serious impact that this precedent will have upon the continued viability of the arbitral process, underscores the necessity for review by this Court. The goals of the Norris-LaGuardia Act and the *Boys Markets* exception to the Act are not furthered by the lower courts' refusal to employ injunctive relief where it is clearly warranted. In the case at bar, an injunction is necessary to preserve the rights emerging out of the grievance arbitration procedure as well as the successor's clause itself. This Court should issue a writ of certiorari to the Sixth Circuit to review and clarify the standards used to employ injunctive relief in aid of arbitration.

CONCLUSION

For all of the reasons stated herein, the portion of the Court of Appeal's opinion addressing the appropriateness of the reverse *Boys Markets* injunction must be reversed. The Petitioner United Food & Commercial Workers Local No. 626 respectfully prays that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to examine the important legal issues raised by the case below, resolve the conflict that the opinion below raises among the circuits, and review the errors of law made below.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed December 10, 1985)

No. 84-3884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff-Appellant,

v.

KROGER COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court
For the Northern District of Ohio

Before: LIVELY, *Chief Judge;* CONTIE, *Circuit Judge;* and BROWN, *Senior Circuit Judge.*

BAILEY BROWN, *Senior Circuit Judge* United Food and Commercial Workers Union, Local 626 ("Union") appeals from an order of the district court denying the Union's request for a preliminary injunction preventing the Kroger Company ("Kroger") from disposing of its interest in its three Lima, Ohio stores pending arbitration of a grievance filed by the Union. Although it ordered arbitration of the Union's grievance, the trial court refused to issue a preliminary injunction, holding the Union had failed to demonstrate the existence of equitable grounds support-

ing the issuance of the requested relief. Because we determine that the district court did not abuse its discretion, we affirm its refusal to issue a preliminary injunction.

I.

Background

Kroger operates approximately 1,090 retail grocery stores in eighteen states, including Ohio. Prior to September 23, 1984, Kroger operated three stores in Lima, Ohio, owning one of the buildings and leasing the other two properties. The Union is a signatory to a collective bargaining agreement ("Agreement") with Kroger, effective until October 25, 1986, which establishes the Union as the exclusive bargaining representative for all employees in the meat and seafood departments of Kroger's Lima stores.[1] The Union represents, in this action, twenty-three former employees of the Lima stores who worked in the meat and seafood departments.

During 1982 and 1983, Kroger's Lima stores operated at a loss, with Kroger losing over $240,000 in the first four and a half months of 1984. In early June of 1984, Kroger attempted to initiate wage concession discussions with the Union and requested a meeting with David Gelios, the president of the Union, to discuss labor costs at the Lima stores. On June 11, the Union responded that it did not intend to reopen the existing contract for any modifications of wage or benefit terms. Kroger forwarded its proposal to the Union on July 3 and indicated that if it did not hear from the Union by July 13, 1984, Kroger

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1. Employees in other departments in the Lima stores are represented by United Food and Commercial Workers Union, Local 1059, which has a separate bargaining agreement with Kroger. Neither Local 1059 nor any of its members is a party to this action.

would "proceed immediately to discontinue [its] Lima operations." On July 24 and September 7, meetings between Kroger and the Union were held with each party submitting proposals for wage and benefit cuts.

On August 15, Kroger advised the Union that unless its proposals were ratified by August 24, 1984, the Lima stores would be closed no later than September 22, 1984. Notice was given by Kroger to the Lima store employees that the stores would close on September 22, 1984.

On September 20, the Union sent a telegram to Kroger protesting Kroger's plans to dispose of its Lima stores. It was the Union's position that "any sale by Kroger of the Lima stores would be subject to the 'successors and assigns' language contained in the Agreement."[2]

A formal grievance was filed by the Union on September 27, 1984, alleging that "[t]he Company violated the entire agreement as well as the successors and assigns language of the preamble." Counsel for the Union advised Kroger that unless Kroger imposed upon a purchaser or a transferee an obligation to recognize the Union, adopt the Agreement and employ members of the Union covered by the Agreement, Kroger would be in breach of the Agreement. The Union requested expedited arbitration of its grievance before any sale of the Lima stores.[3]

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2. The preamble to the Agreement reads as follows:

THIS AGREEMENT entered into by and between The Kroger Co., Columbus, Ohio and Solon, Ohio, hereinafter designated as the Employer, its successors and assigns, and Local 626 of the United Food and Commercial Workers Union, chartered by the United Food and Commercial Workers International Union, AFL-CIO/CLC.

3. The Agreement has no provision for "expedited" arbitration. The dispute procedure contained in the Agreement provides ultimately for binding arbitration of "any differences, disputes or complaints aris[ing] over the interpretation or application of the content of [the] Agreement."

On September 28, Kroger sent a telegram and a letter to the Union advising counsel for the Union that Kroger did not consider the Union's complaint to state a "grievance" cognizable under the Agreement.[4] The communication further stated that:

> [n]either the Local 626-Kroger bargaining agreement nor National Labor Relations policy, as defined by the courts and the NLRB, requires the company to impose upon the purchaser(s) of the three Lima store meat departments an obligation to (A) recognize the Union (B) adopt the bargaining agreement or (C) hire certain employees. The parties' agreement exclusively vests in the company broad managerial discretion regarding the direction and control of store operations, including where and when stores will be opened/closed.

Kroger indicated that at present a purchaser had not been located for the Lima stores and that when the stores were sold, the party would be furnished a copy of the Agreement.[5]

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4. On September 13, 1984, the Union filed an unfair labor practice charge with the National Labor Relations Board, alleging certain violations of § 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1976). Included within the charge was the allegation that Kroger refused to discuss the terms and the conditions of employment as it related to Kroger's plans to close its Lima operations. The charge was subsequently denied by the Board. None of these issues is now before us.

5. Kroger contends that the language relied upon by the Union to impose an obligation on Kroger is simply boilerplate, introductory language which identifies the parties to the Agreement and not the rights and the obligations of the parties. At best, Kroger states, such language may bind an entity which acquires the entire business of Kroger, rather than simply bind a purchaser who acquires a small fraction of its business.

Kroger supports its argument by pointing to Article 10 and Article 18 of the Agreement. These provisions outline employee

(Continued on following page)

The Union filed suit in the United States District Court for the Northern District of Ohio on October 2, 1984, alleging a violation of the Agreement, pursuant to Section 301 of the Labor Management Relations Act of 1947, *as amended* 29 U.S.C. § 185 (1976). The Union sought: (1) a temporary restraining order and a preliminary and a permanent injunction enjoining Kroger from disposing of the three Lima stores pending resolution by an arbitrator of the September 27 grievance filed by the Union; (2) a declaratory judgment that Kroger violated the Agreement; (3) a preliminary and a permanent injunction restraining Kroger from refusing to arbitrate the grievance; and (4) compensatory damages, costs and attorney's fees. The Union complained that unless Kroger was restrained from selling its Lima stores and ordered to arbitrate, its members would be irreparably harmed and would have no adequate remedy at law.

On October 9, 1984, the district court held an evidentiary hearing to consider the Union's request for a preliminary injunction preventing Kroger from transferring ownership to its three Lima stores pending arbitration of the grievance. Evidence was presented to the court which indicated that Kroger's capital investment in the three stores was $3,000,000 and that in 1984 Kroger had lost $461,000. Kroger acknowledged that it was negotiating with purchasers for the Lima stores and indicated

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Footnote continued—

rights to separation and severance pay in the event of a store closing. Additionally, Kroger directs the court's attention to Article 4 of the Agreement which states that "[t]he management and control of the business . . . are vested exclusively in the Employer, subject only to the seniority rules, grievance procedure and other provisions of this Agreement." The effect of these provisions, Kroger contends, is to negate any broad reading of the language contained in the preamble of the Agreement.

that a delay in the sale of one or two months would result in a loss of almost a half million dollars in perishable inventory. Kroger further indicated that if the stores were not sold in time for a new operator to begin business by Thanksgiving, the value of the asset would fall by thirty to fifty percent.

On October 23, 1984, the district court denied the Union's request for a preliminary injunction pending arbitration of the grievance. Utilizing the test articulated in *International Union United Automobile, Aerospace and Agriculture Implement Workers of America v. Lester Engineering Co.*, 718 F.2d 818, 822 (6th Cir. 1983), for the issuance of a *Boys Markets*[6] injunction, the trial court determined that equitable grounds for the issuance of an injunction had not been demonstrated. The district court, however, ordered arbitration of the grievance filed by the Union. The Union then appealed the denial of a preliminary injunction.

On October 25, 1984, the Union filed a motion in district court requesting an injunction pending appeal, which was denied, and, subsequently, the Union moved this court for an injunction pending the appeal. That motion and a motion filed in this court for an expedited hearing were denied on November 25, 1984.

The ultimate issue before this court on appeal is whether the district court abused its discretion in denying the Union's request for a preliminary injunction prohibiting the sale of the stores pending arbitration.

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6. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

II.

Propriety of Review

Kroger initially contends that any review by this court of the propriety of the district court's refusal to issue the injunction is unwarranted since, it contends, the admitted sale of its Lima operations has now rendered this dispute moot. The Union concedes that, under ordinary principles of justiciability, its claim is moot. It contends, however, that the isssue presented is capable of repetition and yet evades review and that, therefore, the case before us presents a controversy under Article III of the Constitution.

This doctrine upon which the Union relies was first recognized in *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911), and remains a viable doctrine. *Weinstein v. Bradford,* 423 U.S. 147, 148-49 (1975). We conclude that the issue presented by the denial of the preliminary injunction in this case meets both requirements for the application of this doctrine.

The issue between these parties is certainly capable of repetition since this same collective bargaining contract between the parties covers many other Kroger stores in northwestern Ohio. If Kroger sought to dispose of another of these stores without requiring an assumption of the obligations of the collective bargaining contract by the purchaser, the same issue would be presented.

The question whether the claim can be said to evade review is a more difficult one. It is clear, at least, that in the normal course of events the claim presented in the appeal before this court, i.e., whether the Union is entitled to an injunction pending arbitration, could not be fully litigated before the sale of the stores was con-

summated. Kroger argues, however, that the issue does not evade review because the issue of whether the sale of the stores involved in this very case constituted a breach of the collective bargaining contract remains to be litigated in the arbitration proceeding. Kroger further points out that if an arbitrator determines that there was a breach of contract, back pay and damages may be awarded. In this connection, Kroger relies on language in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). There an action was brought against the City and certain police officers by a plaintiff who alleged that he was severely injured by a "chokehold" applied to him without cause by the police when he was stopped for an alleged traffic offense, and that such was done pursuant to City policy. Plaintiff sought damages and an injunction prohibiting the use of the "chokehold" in similar circumstances. Plaintiff had obtained a preliminary injunction and, in the Supreme Court, the question was whether the claim for an injunction presented a justiciable controversy. It had been suggested to the Court that the case had become moot since the City had amended its policy with respect to the use of the "chokehold." The Court held that the case was not moot "[s]ince the moratorium [on the "chokehold"] by its terms is not permanent." *Id.* at 101. The Court, nevertheless, held that "for another reason," *id.* at 101, the plaintiff should not have been granted an injunction, this reason being that he did not have standing to assert the claim for an injunction. The reason that plaintiff did not have standing, the Court explained, was that he could not demonstrate a likelihood that he would again be subjected to such treatment by the police. Although the Court had already expressly held that the case was not "moot," it took occasion to consider whether the claim was capable of repetition and yet evaded review

and stated that the doctrine was "inapposite." *Id.* at 109. "[Plaintiff's] claim that he was illegally strangled remains to be litigated in his suit for damages; in no sense does that claim 'evade' review." *Id.* In the instant case, Kroger argues that, similarly, the Union's claim does not evade review because the arbitrator may determine whether there was a breach of contract and may award back pay and damages.

It appears to this court that the Supreme Court's statement that plaintiff's claim for an injunction against the City of Los Angeles did not evade review because his claim for damages remained to be litigated was at the most *dictum.* This is true because, as stated earlier, the Court had held that the issue raised by the claim for an injunction was not moot and had held that it was not justiciable for a different reason, that is, lack of standing. Moreover, in *Lyons,* the substantive issue presented in both the damage claim and the injunction claim was the constitutionality of the City's policy and the police conduct, and this issue would be litigated in connection with the damage claim. On the contrary, in the instant case, while it is true that the Union's claim of breach of contract and its accompanying claims for back pay and damages will be litigated in the pending arbitration, the Union may not be able to obtain an arbitration ruling as to whether, if the stores had not been sold, Kroger would have been proscribed, under a proper construction of the contract, from selling the stores absent an assumption by the purchaser of the obligations of the collective bargaining contract. Thus, it appears to us that this important claim of the Union may well evade review.[7] By so holding we do not

7. Kroger concedes only that, if the arbitrator found a breach of contract, back pay and damages could be awarded.

mean, of course, to indicate a view as whether the Agreement should be so construed.[8]

Accordingly, we determine that the Union's claim for an injunction pending arbitration is capable of repetition and yet evades review and therefore presents a justiciable controversy.

III.

Injunction Pending Arbitration

As stated, while the district court enforced the Union's right to arbitration of the alleged breach of contract,[9] it denied the request for a preliminary injunction. In so doing, it recognized a requirement of *Boys Markets,* 398 U.S. at 254, reiterated by this court in *Lester Engineering,* 718 F.2d at 824, that, in addition to the other prerequisites to the issuance of an injunction in a labor dispute, it must be shown that the traditional bases for equitable relief are present. The district court then determined that equitable bases were not present and denied the injunction on that ground. Since we conclude that the district court, in making the determination, did not abuse its discretion, we need not decide whether the *Boys Markets* narrow exception to the Norris-LaGuardia Act's[10] proscrip-

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8. Another factor that distinguishes the instant case from the facts presented to the Court in *Lyons* is the fact that here we must take into consideration the very strong policy of protecting the arbitration process provided for in a collective bargaining contract. *Boys Markets,* 398 U.S. at 249; *Buffalo Forge Co. v. United Steel Workers,* 428 U.S. 397, 407 (1976).

9. Although Kroger's position was that the Union's claim was not subject to arbitration, it does not contend in this court that the district court erred in holding that the claim was subject to arbitration.

10. 29 U.S.C. § 104 (1976).

tion of injunctive relief in a labor controversy is applicable in the instant context.[11]

The district court determined, based on the evidence, that the failure to grant an injunction would not result in the Union's suffering "irreparable harm" since the court's order requiring arbitration substantially preserved the arbitration process, and an arbitrator could award, as Kroger concedes, back pay and damages if it is found that Kroger breached the contract. The district court also determined, balancing the equities, that Kroger would suffer substantial economic harm if an injunction were erroneously granted unless the Union posted a very large bond. As to the likelihood of success on the merits, the district court, while declining to rule on the merits of the Union's construction of the collective bargaining contract, intimated that there was at least substantial doubt whether the Union's construction of the Agreement was correct. Taking all of these factors into consideration, the district court concluded that it should not issue the preliminary injunction.

The Union concedes that the district court can be reversed only if it abused its discretion. We need not here decide whether the district court was correct in each of its conclusions. After considering the record before the district court, we decline to find that it abused its discretion.

The judgment of the district court is, accordingly, AFFIRMED.

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11. The Union has described its claim for an injunction here as being a "reverse *Boys Markets*" claim. Clearly, to agree with the Union's contention requires a broadening of the *Boys Markets* exception.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PRELIMINARY INJUNCTION

(Filed November 15, 1984)

No. 84-3884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff-Appellant,

v.

THE KROGER COMPANY,
Defendant-Appellee.

ORDER

BEFORE: KENNEDY, KRUPANSKY, and WELLFORD, *Circuit Judges*

The plaintiff Union appeals the denial of a preliminary injunction in this action to compel arbitration. The district court did order the Union's grievance to proceed to arbitration, but denied an injunction which would have prevented the defendant Company from selling its three stores in Lima, Ohio, without requiring the purchaser(s) to assume the Company's obligations under the collective bargaining agreement. The district court also denied the Union's request for an injunction to that effect pending a decision on the present appeal. The Union now renews

that motion before this Court pursuant to Rule 8, Federal Rules of Appellate Procedure. The Company opposes the motion.

Upon consideration of the motion and the memoranda filed in support thereof and in opposition thereto, and finding the motion not well-taken,

It is ORDERED that the motion for an injunction pending appeal be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed October 23, 1984)

Case No. C 84-7822

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff,

vs.

THE KROGER COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, *J.*:

This cause is before the Court on plaintiff's motion for a preliminary injunction. Plaintiff seeks an order to compel arbitration of a grievance filed on September 27, 1984, and an injunction to prevent the defendant from selling three closed stores without imposing the parties' collective bargaining agreement upon the purchasers of the stores.

A hearing was held on October 9, 1984 on the motion for a preliminary injunction. Both parties presented exhibits and testimony to the Court. The Court requested briefs and proposed findings of facts and conclusions of law. The Court has considered the evidence received

and the proposed findings of fact and conclusions of law submitted by the parties and has made its own independent determination and hereinafter, pursuant to Fed.R. Civ.P. 65, sets forth its reasons for its order. The Court is of the opinion that plaintiff's motion for an order to compel arbitration of the grievance should be granted but that part of plaintiff's motion seeking a preliminary injunction to prevent defendant from selling the closed stores without imposing the parties' collective bargaining agreement upon the purchasers of the store must be denied.

Findings of Fact

1. The plaintiff is a labor organization and defendant is an employer in or affecting commerce within the meaning of §2(2), §2(5), §2(6) and §2(7) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. §152(2), §152(5), §152(6) and §152(7).

2. Plaintiff is an unincorporated association with its office at 9970 Old Airport Highway, Monclova, Lucas County, Ohio. There are approximately 6,000 dues-paying members of Local 626.

3. Defendant, an Ohio corporation headquartered in Cincinnati, Ohio, is a national retailer of grocery and related products. Defendant operates 1,090 retail grocery stores in 13 states, including Ohio.

4. Plaintiff and defendant are and have been signatories to a collective bargaining agreement wherein plaintiff is the exclusive representative for all employees in the meat-seafood departments of the defendant's stores in Northwest Ohio. The three Lima area stores involved in this dispute are part of the bargaining unit represented by the plaintiff.

5. Prior to September 23, 1984, defendant operated three stores in Lima, Ohio. The oldest store was opened in 1950 and is in a free standing building of approximately 17,500 square feet in the Lima Central Business District. The lease on this store will expire in June, 1985. The other Kroger store under lease was opened in 1978 and is located across from the Lima Mall in a strip shopping center along with a Rink's Department Store and approximately 10 smaller merchants. This store has 31,000 square feet and is under lease to 1998. The newest Kroger store, opened in 1982, is located on Cable Road southwest of the City and occupies 34,000 square feet. Kroger owns this store. Immediately adjacent to and contiguous with this store is a Super-X Drug Store. The Cable Road store had a meat-seafood department. The other two stores had only meat departments. The meat/seafood department occupies less than 7% of the Cable Road store's entire area (Defendant's Exhibit H), and an even lesser percentage in the other two stores.

6. Prior to September 23, 1984, the three Lima stores employed 23 members of Local 626, including 6 part-time employees and those on layoff. Another UFCW local union, Local 1059, represents 125 retail clerks who were also employed at the Lima stores. Local 1059 is not a party to this action.

7. During the past two years, defendant's Lima stores were operated at a loss. During the first four and one-half months of 1984, the Kroger Lima stores lost over $240,000.00.

8. On June 1, 1984, Patrick Kenney, a Kroger Vice-President, brought these facts to the attention of David Gelios, President of Local 626, and requested a meeting to discuss labor costs at the three Lima stores. In Mr.

Kenney's letter to Mr. Gelios, he described the situation as one of "extreme importance and urgency."

9. The parties met and discussed contract modifications without success. The Union was notified on August 15, 1984 that if the Company's proposal was not adopted the three stores would close on September 22, 1984. Notice was given on August 22, 1984 to the employees and the stores were closed on September 22, 1984.

10. The contract modifications sought by defendant would not have completely eliminated its operating losses at the Lima stores, but would have reduced those operating losses from $50,000 per week to $15,000 per week.

11. On September 11, 1984, Local 626 filed an unfair labor practice charge with the National Labor Relations Board, alleging that Kroger refused to bargain in good faith and/or breached its bargaining agreement in violation of Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act. This charge is currently under investigation by the Regional Office of the National Labor Relations Board.

12. Employees at the Lima stores have no "bumping" rights into other area stores.

13. On September 26, 1984, plaintiff sent a telegram to defendant "protesting Kroger's right to sell, lease or otherwise dispose of the Lima stores in violation of the successors and assignees language of the contract." On the same date, the Union sent another telegram requesting information regarding defendant's plans for the closed Lima stores.

14. On September 27, 1984, plaintiff prepared a grievance alleging that "[t]he Company violated the entire agreement as well as the successors and assignees lan-

guage of the preamble, and Article 6." On that same day, plaintiff's counsel advised defendant's counsel that unless the defendant imposed upon a purchaser or transferee an obligation to recognize the Union, adopt the collective bargaining agreement, and employ its members working under that agreement, the Company would be in violation of the successors and assigns language in the preamble to the agreement.

15. On September 28, 1984, the Company sent a responsive telegram and a letter, advising the Union's attorney that there was no "grievance" cognizable under the collective bargaining agreement, that the company had no obligation under its bargaining agreement or as a matter of law to impose upon any purchaser an obligation to (a) recognize the Union, (b) adopt the bargaining contract, or (c) hire certain employees; that the Union's request for certain information "to process the grievance" was improper because there was no such "grievance" but, in view of the fact that there was impact bargaining scheduled for October 4, the Company related that it owned one of the three stores and leased the other two, no stores had been sold and any buyer would be furnished a copy of the collective bargaining agreement.

16. The defendant has been contacted by three potential purchasers and will, if an agreement can be consummated, sell, lease or otherwise transfer the three Lima stores, whether or not the new owners or lessees agree to abide by the terms of the parties' collective bargaining agreement.

17. Although perishable goods have been removed from the three stores, there remains $466,000 in inventory, $278,000 in leasehold equipment, and over $1,000,000 in equipment and rolling stock. The value of the real estate

at the Cable Road store is $1.6 million. Kroger's total capital investment in the three stores exceeds $3,000,000. Some of the assets listed above may be transferred or sold, but a delay in the sale of the stores will have a substantial adverse impact upon the saleability and purchase price of the stores. This is particularly true because of the importance of the Thanksgiving, Christmas and New Year's holidays as they affect retail sales of a prospective purchaser.

18. The Union claims the Company is threatening to breach the following language in the preamble to the collective bargaining agreement:

> THIS AGREEMENT entered into by and between The Kroger Co., Columbus, Ohio and Solon, Ohio, hereinafter designated as the Employer, its successors and assigns, and Local 626 of the United Food and Commercial Workers Union, chartered by the United Food and Commercial Workers International Union, AFL-CIO/CLC.

The interpretation and application of the words "successors and assigns" is the gravamen of the grievance and, as noted above, is found in the preamble of the agreement and in no other provision of the contract.

19. The "Management Rights" clause found in the agreement provides as follows:

> ARTICLE 4. MANAGEMENT RIGHTS
>
> The management and control of the business, the direction of the working forces, including the right to plan, direct and control store operation, the methods of production and processing, the kind and operation of machinery and equipment, the right to transfer and relieve employees from duty because

of lack of work or for other legitimate reasons, the determination of what products shall be processed and handled, and the standard of quality to be maintained, and the determination of where and how such products shall be processed, manufactured and distributed are vested exclusively in the Employer, subject only to the seniority rules, grievance procedure and other provisions of this Agreement.

20. The agreement contains specific provisions regarding employee rights in the event of a store closing, as follows:

ARTICLE 10. HOURS AND WORKING CONDITIONS

N. *Separation Pay*: An employee classed as regular who is separated for incompetence or who is laid off due to a discontinuance of the job, store closings, or reduction of force, shall be entitled to one (1) week's notice or one (1) week's pay in lieu of notice except in case of dishonesty, drinking on the job, being under the influence of liquor on the job, gross insubordination and discourtesy to customers. In the event of a layoff out of seniority, the Employer will have no liability for one (1) week from the time a grievance is filed if the Employer has given prior notice.

ARTICLE 13. SEVERANCE PAY

A. In the event the Employer closes a store and full-time employees with at least five (5) years continuous service are terminated as a result of the closing or being displaced as a result of a store closing, the employee will be entitled to severance pay.

21. The Union has offered to engage in "expedited" arbitration. The dispute procedure contained in the col-

lective bargaining agreement provides for arbitration of "differences, disputes or complaints. . . over the interpretation or application of the contents of this Agreement" by an arbitrator selected from a panel provided by the Federal Mediation and Conciliation Service (Article 5, Para. A). The agreement provides that the arbitrator "shall not have the power to alter or modify the terms of the Agreement. . . ." (Article 5, Para. C). The agreement has no provision for "expedited" arbitration.

Conclusions of Law

1. The issuance of a federal injunction is controlled by the Norris-LaGuardia Act, 29 U.S.C. §101 *et seq.* *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970) allows in certain circumstances the issuance of status quo injunctions pending arbitration.

2. Federal courts are empowered by Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185 to enforce promises to arbitrate grievances. *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

3. There is a strong national policy favoring arbitration. *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960).

4. The parties agreed to arbitrate. The question of interpretation of the collective bargaining agreement is for the arbitrator. *Auto Workers v. Lester Engineering Co.,* 718 F.2d 813 (6th Cir. 1983) and authorities therein cited.

5. This Court may not determine the merits of the grievance. That is for the arbitrator. This Court cannot say with positive assurance that the words "successors

and assigns" are not susceptible to an interpretation favoring the Union. Doubt must be resolved at this point in favor of arbitration. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1959) and *Lester, supra* at 823 to the effect that the arbitration clause generally should be read indulgently.

6. The Court finds that the grievance and the interpretation and application of the words "successors and assigns" are subject to arbitration, and so orders same.

7. *Lester, supra* at 822 sets forth a four step procedure. It is as follows:

> The Supreme Court has articulated a four-step procedure which a district court must follow to issue a *Boys Markets* injunction. First, the controversy must involve or grow out of a labor dispute within the meaning of Section 4 of the Act. Second, a full evidentiary hearing must be held. Third, the court must find that the dispute underlying the controversy is subject to binding arbitration under the terms of the collective bargaining agreement. Finally, the traditional equitable bases for injunctive relief must be met. A court has jurisdiction to issue an injunction only where all four of the above steps have been completed and satisfied.

8. The Court now discusses that part of the Union's motion pertaining to maintaining the status quo as to the sale or lease of the three stores. The Court views this prong as it relates to the "traditional equitable bases for injunctive relief. . ." See also, *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970).

9. This Court must weigh the equities and determine if defendant would suffer more from granting the injunc-

tion than the plaintiff would from its denial. See *Detroit News. Pub. Ass'n v. Detroit Typo Un. No. 18, etc.*, 471 F.2d 872 (6th Cir. 1972). A factor is the integrity of the arbitration system. The Court does not find that its decision will have a significant effect on the plaintiff or its ability to bargain and/or represent its members. The Court does not find that the plaintiff will or has suffered irreparable harm. The arbitration system is, in part, preserved by the granting of the motion to compel arbitration.

10. The Court finds that defendant will suffer substantial economic harm, but the Court's decision is motivated primarily by the fact that the plaintiff has an adequate remedy at law. Plaintiff's remedies are proposed by the defendant. That being the case, it would be unseemly for defendant to attempt at some later date to abandon its position. The remedies are an award by the arbitrator of back pay and damages. *Aluminum Workers Int'l Union v. Consolidated Aluminum Corp.*, 696 F.2d 437 (6th Cir. 1982). See also *Intern. Un. United Auto., Etc. v. LaSalle Mach. Tool*, 696 F.2d 452 (6th Cir. 1982). The plaintiff may obtain adequate remedies from the arbitrator and/or the National Labor Relations Board.

The Court is aware that it should not make a merit decision for this is the function of the arbitrator. Nevertheless, the Court must initially consider the likelihood of success on the merits when it considers the ancillary relief requested. There must be some likelihood of success. See *Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974). Furthermore, if plaintiff loses, defendant will be without a remedy unless a large bond is posted, see *Hoh v. Pepsico, Inc., supra.* The success, as stated in *Hoh*, is not the simple likelihood of success in compelling arbitration, as in the instant case this Court has granted this

relief, but success in obtaining the award in aid of which the injunction is sought. See *Hoh, supra* at 561, as follows:

> Although courts have been directed by the *Steelworkers* Trilogy, 363 U.S. 564, 574, 593, 80 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit.

Balancing the equities, the consideration of the likelihood of success, as limited above, and the availability of other remedies and the likelihood of injury to the parties, the Court finds that the equities balance in favor of defendant, and this part of the motion will be denied.

THEREFORE, for the foregoing reasons, it is

ORDERED that plaintiff's motion to compel arbitration of the grievance be, and hereby is, GRANTED; and it is

FURTHER ORDERED that plaintiff's motion to enjoin the defendant from selling or otherwise transferring the three (3) Lima stores pending arbitration of the grievance be, and hereby is, DENIED.

/s/ JOHN W. POTTER
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT DENYING MOTION FOR STAY OF PROCEEDINGS AND INJUNCTIVE RELIEF

(Filed October 26, 1984)

Case No. C 84-7822

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff

VS.

THE KROGER COMPANY,
Defendant

ORDER

WALINSKI, *J.*:

This matter is before the Court on plaintiff's motion for "stay of proceedings and . . . grant [of] injunction instanter pending appeal" of this Court's October 23, 1984 order granting plaintiff's motion to compel arbitration and denying plaintiff's motion for preliminary injunction.

Plaintiff argues it will suffer irreparable harm absent the grant of such stay and injunction pending appeal. Moreover, plaintiff asserts that this Court failed to balance the equities regarding the effect upon each party of the

grant or denial of the preliminary injunction sought by plaintiff, and that this Court applied the wrong standard in deciding same. This Court finds plaintiff's arguments to be without merit.

This Court in its October 23, 1984 findings of fact and conclusions of law determined that plaintiff's September 27, 1984 grievance and the interpretation of collective bargaining agreement language are arbitrable matters, that balancing the equities regarding the effect of an injunction weigh in favor of defendant, that the plaintiff will not suffer irreparable harm by denial of injunctive relief and that the proper standard to be applied as required by the Sixth Circuit Court of Appeals was that enunciated in *International Union United Automobile Aerospace and Agricultural Implement Workers of America, UAW v. Lester Engineering Company,* 718 F.2d 818, 824 (1983).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiff's motion for stay of proceedings and injunctive relief be, and it hereby is, DENIED.

/s/ NICHOLAS J. WALINSKI
United States District Judge

JUDGMENT ENTRY OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 10, 1985)

No. 84-3884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff-Appellant,

v.

THE KROGER COMPANY,
Defendant-Appellee.

Before: LIVELY, *Chief Judge;* CONTIE, *Circuit Judge;* and BROWN, *Senior Circuit Judge.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed January 29, 1986)

No. 84-3884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff-Appellant,

v.

THE KROGER COMPANY,
Defendant-Appellee.

ORDER

BEFORE: LIVELY, *Chief Judge,* CONTIE, *Circuit Judge,* and BROWN, *Senior Circuit Judge*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT STAYING MANDATE

(Filed February 19, 1986)

No. 84-3884

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 626,
Plaintiff-Appellant,

vs.

THE KROGER COMPANY,
Defendant-Appellee.

ORDER STAYING MANDATE

Upon consideration, it is ORDERED that the motion to stay issuance of the mandate pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed until the date on which the movant's application for a writ of certiorari must be filed pursuant to 28 U.S.C. Section 2101 or Rule 20 of the Supreme Court Rules, as applicable. However, if within such time, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK

/s/ JOHN P. HEHMAN

29 U.S.C. § 104

§ 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

29 U.S.C. § 185

SUBCHAPTER IV—LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by

the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

EXCERPTS OF THE UNION CONTRACT

YOUR UNION CONTRACT

[UFCW Logo]

KROGER COMPANY
UNITED FOOD AND COMMERCIAL WORKERS
Local 626, AFL-CIO-CLC

9970 Old Airport Highway Monclova, Ohio 43542-9989

INDEX

UNITED FOOD AND COMMERCIAL WORKERS,
UNION LOCAL NO. 626
TOLEDO MEAT

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ATTACHED LETTER OF UNDERSTANDING "B" DATED DECEMBER 1, 1983

ATTACHED LETTER OF UNDERSTANDING "C" DATED DECEMBER 1, 1983

TERM: OCTOBER 30, 1983 THROUGH OCTOBER 25, 1986

[1] AGREEMENT

THIS AGREEMENT entered into by and between The Kroger Co., Columbus, Ohio and Solon, Ohio, hereinafter designated as the Employer, its successors and assigns, and Local 626 of the United Food and Commercial Workers Union, chartered by the United Food and Commercial Workers International Union, AFL-CIO/CLC.

ARTICLE 1. PURPOSE AND INTENT

The Employer and the Union each represents that the purpose and the intent of this Agreement is to promote cooperation and harmony, to recognize mutual interests, to provide a channel through which information and problems may be transmitted from one to the other, to formulate rules to govern the relationship between the Union and the Employer, to promote efficiency and service, and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment.

ARTICLE 2. COVERAGE

A. The Union shall be the sole and exclusive bargaining agent for all employees of the Employer in the meat departments of the retail stores of the Employer located in the State of Ohio, Counties of Williams, Fulton, Lucas, Wood, Ottawa, Sandusky, Erie, Huron, Seneca, Hancock, Putnam, Henry, Defiance and Paulding. (See Letter of Understanding "B".)

B. For the purpose of this Agreement the meat department is defined as the area occupied by the refrigerated meat storage rooms, the meat preparation room and the refrigerated service and/or self-service meat display cases where fresh, smoked, cooked and frozen meats, poultry,

fish and seafoods are offered for retail sale. Where certain products covered under this clause are being handled outside of the meat department, the Employer may continue to handle such products in accordance with present practice. All products customarily and normally handled and prepared on or off the store premises shall continue to be serviced by employees of the bargaining unit in the store.

C. In the event the Employer prepares and packages meat at a central point in the Local Union 626 jurisdiction, such work will be done by members of this Local Union.

ARTICLE 3. [2] SHOP CONDITION

A. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain members in good standing and those who are not members on the execution date of this Agreement shall on the 31st day following the execution date of this Agreement or on the day thereafter become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after the execution date shall on the 31st day following the beginning of such employment or on the day thereafter become and remain members in good standing in the Union.

B. The Employer shall deduct for the term of this Agreement, Union initiation fees and dues on a weekly basis from the pay of members of the Union who individually and voluntarily certify in writing authorization for such deductions. The Employer shall promptly remit all sums deducted in this manner to District Union 626.

C. The Employer agrees to notify the Union in writing once each four (4) week period of any new employees and give to the Union the name of such employee, his Social Security Number, the position for which employed, date of hire and rate of pay at which the person is employed.

ARTICLE 4. MANAGEMENT RIGHTS

The management and control of the business, the direction of the working forces, including the right to plan, direct and control store operations, the methods of production and processing, the kind and operation of machinery and equipment, the right to transfer and relieve employees from duty because of lack of work or for other legitimate reasons, the determination of what products shall be processed and handled, and the standard of quality to be maintained, and the determination of where and how such products shall be processed, manufactured and distributed are vested exclusively in the Employer, subject only to the seniority rules, grievance procedure and other provisions of this Agreement.

ARTICLE 5. DISPUTES AND ARBITRATION

A. *Job Steward*: The Union shall have the right to designate a job steward in each store. A line showing the names and store addresses of all stewards is to be submitted to the Employer.

B. [3] *Dispute Procedure*: Should any differences, disputes or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of both parties to settle such promptly through the following steps:

STEP 1. By conference between the aggrieved employee, the job steward, or both, and the

manager of the store. If the grievance is not settled in Step 1, it shall be reduced to writing by the grievant and referred to Step 2 within seven (7) calendar days days after its initiation in Step 1.

STEP 2. By conference between the job steward and/or the business agent and the zone manager. If the grievance is not settled in Step 2 within ten (10) calendar days of its referral to Step 2, it shall be referred to Step 3.

STEP 3. A conference between the official or officials of the Union, the Personnel Manager, the Divisional Vice President, and/or a representative of the Company so delegated by the Divisional Vice President will be held within 21 days after the Step 2 conference. The Employer will give the Union the answer to the grievance in writing within seven (7) calendar days after the Step 3 meeting.

STEP 4. In the event that no settlement is reached in the above steps, the complaint shall be reduced to writing and submitted to the Board of Arbitration. In the event that no settlement is reached in the above steps, and Union wishes to arbitrate the grievance, the Union must request arbitration within fifteen (15) calendar days of the Employer's written response in Step 3.

C. The Board of Arbitration shall consist of one (1) person appointed by the Union and one (1) person appointed by the Employer. Said two (2) persons shall

within three (3) days after disagreement, request the Federal Mediation and Conciliation Service to furnish a panel from which a third arbitrator shall be chosen and the decision of the majority shall be binding on the Union, Employer and the aggrieved employee. The expenses of the third arbitrator shall be paid for jointly. The third arbitrator shall not have the power to alter or modify the terms of the Agreement, or any subsequent supplement thereof.

D. [4] No grievance will be discussed unless the outlined procedure has been followed, and the grievance presented within seven (7) calendar days. All time limits in this grievance procedure, however, may be extended by mutual agreement of the parties.

E. The Employer shall have the right to call a conference with a job steward or officials of the Union for the purpose of discussing his grievances, criticisms or other problems.

F. At any step in this grievance procedure, the Executive Board of the Local Union shall have the final authority, in respect to any aggrieved employee covered by this Agreement, to decline to process a grievance, further if in the judgment of the Executive Board such grievance lacks merit or lacks justification under the terms of this Agreement, or has been adjusted or justified under the terms of this Agreement to the satisfaction of the Union Executive Board.

G. It is agreed that the Employer shall furnish the Union and its designated representatives all pertinent information requested by the Union for the study and processing of grievances.

H. *Discharge*: The Employer may at any time discharge any employee for proper cause. The Union may file a written complaint with the Employer asserting that the

discharge was improper. Such complaint must be taken up promptly and if the Employer and the Union fail to agree within forty-eight (48) hours, it shall be referred within twenty-four (24) hours to the Board of Arbitration. Should the Board determine that it was an unfair discharge, the Employer shall reinstate the employee in accordance with the decision of the arbitrator.

I. *Union Visitation*: A manager of the store will grant to any accredited Union official the right to communicate with the employees of the store so long as there is no interference with efficient store operation.

ARTICLE 6. NO STRIKE, NO LOCKOUT

A. During the term hereof, the Union agrees that there shall be no strike or any other interference with or interruption of the normal conditions of the Employer's business by the Union or its members. The Employer agrees that there shall be no lockout.

B. [5] It shall not be a violation of this Agreement for persons covered hereunder to refuse to cross a labor picket line in any instance where said labor picket line has been officially recognized or authorized by the Chief Executive officer of the Union and where the labor picket line is established for legal purpose and is not contrary to or in violation of any federal, or state constituted laws or the laws of the state in which the labor picket line is established. Before official recognition is given to any labor picket line, such action shall be discussed with the Employer.

ARTICLE 7. CONFLICTING AGREEMENTS

The Employer agrees not to enter into any agreement or contract with his employees, individually or collec-

tively, which in any way conflicts with the terms and provisions of this Agreement.

ARTICLE 8. JOB ASSIGNMENT

Employees shall perform any work under the jurisdiction of this Agreement, which the manager of the store or the zone manager may direct with the understanding that when an employee is assigned to a job with a lesser rate, he will be entitled to his regular rate of pay, unless due to a decrease of work, he has been regularly assigned to a lower rated job and desires to retain such job rather than accept a layoff.

ARTICLE 9. WAGES

Rates of pay as set forth in Wage Schedule "A" attached hereto, shall remain in effect for the life of this Agreement and shall constitute the basis for determination of wages for time worked.

ARTICLE 10. HOURS AND WORKING CONDITIONS

A. *Work Schedules*: The hours for each employee shall be scheduled by the Employer.

B. The hours for each employee will be posted by Friday noon for the succeeding week. The workweek for full-time regular employees shall be forty (40) hours to be scheduled in five (5) eight (8) hour days not necessarily consecutive in a regular week and four (4) eight (8) hour days, not necessarily consecutive in a holiday week. There will be no overlapping of [6] schedules from one calendar day into the next. Work scheduled on Sundays and/or holidays will be in excess of the workweeks outlined above and on a rotation basis. Full-time employees

shall be scheduled for a full weeks work in advance and shall not be changed except in case of emergency. If for any reason it becomes necessary to work an employee beyond his scheduled time, the employee shall be permitted to work the balance of his week as scheduled. Except in case of emergency, schedules shall be changed the week before when such changes are made necessary by holidays.

C. All employees will be given at least ten (10) hours off between shifts.

D. When employees are required to work three (3) hours prior to store opening, such schedules will be discussed with the meat cutters beforehand.

E. *Split Shifts*: There shall be no split shift schedules for employees.

F. Two (2) employees will not be scheduled back to back within two (2) hours of one another unless the initial employee has worked the basic workday or is not available for further work.

G. *Minimum Hours*: Any employee who is scheduled to report to work or is called in shall have at least four (4) hours of work provided if the employee is available.

H. Part-time employees will be guaranteed twelve (12) hours of work unless called to work at the end of the week when less than twelve (12) hours are available.

I. *Overtime*: Time and one-half (1½) will be paid for all hours worked in excess of forty (40) hours per week or in excess of eight (8) hours per day. Employees required to work on a scheduled day off or for work performed on the sixth day of a workweek exclusive of Sunday will receive time and one-half (1½) for such work provided, however, there will be no pyramiding of

premium pay and any hours paid for at premium pay will be excluded from the computation of any other premium pay or overtime.

J. *Night Work and Premium*: With the exception of stores located in Allen County, the Employer shall rotate all night work among all classifications. The Head Meat Cutter shall be rotated on the same basis as other full-time employee up to a maximum of four (4) nights per four (4) week period.

[7] The night premium will be fifty cents (50¢) per hour for all hours worked between 6:00 p.m. and 6:00 a.m. Sundays and holidays included. The fifty cents (50¢) per hour will not be pyramided.

K. *Member on Duty*: With the exception of stores located in Allen County and also with the exception of any Seafood Departments located within any of the stores covered by this Agreement, there shall be a member of the bargaining unit on duty during all hours that the store is open for business (excluding lunch or dinner periods), except for Monday, Tuesday, Wednesday, Thursday and Saturday nights the last four (4) hours the store is open for business. The understanding will be that no full-time employee hired prior to November 2, 1980 will be reduced in hours or laid off because of this change and for a proven violation, unless satisfactorily rectified by the Employer, the Employer will be required to have a member on duty all hours the store is open for business (except lunch or dinner periods).

In the event the Employer should extend store hours to a twenty-four (24) hour operation, a member of the bargaining unit shall be on duty all hours the store is open for business (excluding lunch or dinner periods) and except midnight to 6:00 a.m.

Stores located in Allen County shall have a member of the bargaining unit on duty all times that meat is offered for sale, excluding breaks, dinner periods and 10:00 p.m. to 6:00 a.m., excluding store IN-97.

Sunday Coverage: There shall be coverage for only one-half (½) the hours a store is open on Sunday. In the event bargaining unit work is performed by employees outside of the bargaining unit, the Company will pay to the employee scheduled on the Sunday in question double-time (2x) for all hours worked with a minimum of one (1) hour. (Excluding store IN-97).

In any Seafood Departments covered by this Agreement the hours of operation and employee coverage will be determined by the Employer.

L. *Lunch Periods*: All employees working in excess of seven (7) hours in an eight (8) hour day shall be given a maximum of one-half (½) hour for lunch (except for a two (2) man store, which may continue to have a one (1) hour maximum) without pay, scheduled approximately between the third and fifth hour of work.

M. [8] *Rest Periods*: Each full-time employee shall be scheduled for two (2) fifteen (15) minute rest periods each day. These rest periods shall come as nearly as possible in the middle of each half day. A part-time seniority employee who is scheduled for four (4) hours or more will receive a rest period and if scheduled seven [7] hours or more shall receive two (2) rest periods.

N. *Separation Pay*: An employee classed as regular who is separated for incompetence or who is laid off due to a discontinuance of the job, store closings, or reduction of force, shall be entitled to one (1) week's notice or one (1) week's pay in lieu of notice except in case of dishonesty, drinking on the job, being under the in-

fluence of liquor on the job, gross insubordination and discourtesy to customers. In the event of a layoff out of seniority, the Employer will have no liability for one (1) week from the time a grievance is filed if the Employer has given prior notice.

O. *Head Meat Cutter Relief Pay*: Any employee assigned as a relief Head Meat Cutter, excluding the Head Meat Cutters' scheduled days off, will receive the rate of pay established for the job in which he is relieving. Any employee assigned a relief Head Meat Cutter for vacation relief shall receive the Head Meat Cutter's rate from the first (1st) day of such assignment.

P. *Time Clocks*: Time clocks shall be provided in each store and employees shall be responsible for punching their own time cards and following proper time keeping procedures. Any write-ins of time or corrections must be initialed by the employee and the store manager. Employees failing to follow these procedures or working unauthorized time will be subject to disciplinary action including discharge.

Q. *Uniforms*: Frocks, aprons and uniforms required by the Employer shall be furnished and laundered free of charge to the employee. Tools and sharpening of tools shall be furnished by the Employer. Where dacron or similar type uniforms are furnished to employees, such uniforms shall be laundered by the employee.

R. *Store Meetings*: If any employee is required to attend a store meeting outside of his scheduled work hours, such time will be considered time worked.

S. *Transfers*: Temporary transfers from one store to another will be limited to two (2) weeks, except in case of vacation relief and sick relief.

T. [9] In case of a temporary transfer of an employee to another city, at the request of the Employer, involving additional transportation cost, the employee will be reimbursed for the miles traveled between city limits at nineteen cents (19¢) per mile.

U. Full-time employees who desire to transfer to a store closer to their home shall notify, in writing, the Zone Manager, Company Personnel Department, and the Union of their desire. The Employer may agree to transfer said employee if a permanent full-time vacancy exists in their classification or if another full-time employee agrees to exchange work shifts with said employee. Such transfers are subject to the mutual agreement of the Employer. If two (2) or more employees request a transfer to the same store, seniority shall apply. The intent of this clause is to reduce an employee's travel distance to and from work for the purpose of energy conservation.

V. *Travel Pay*: Employees working in more than one store in a workday will be paid for the time spent traveling between the stores.

W. *General*: Store rules will be posted in the store.

X. The Employer shall not require any employee to submit to a polygraph test.

Y. An employee injured on the job shall be paid for all scheduled straight-time hours lost because of such injury on the day the injury occurs.

* * * * *

ARTICLE 13. [14] SEVERANCE PAY

A. In the event the Employer closes a store and full-time employees with at least five (5) years continuous service are terminated as a result of the closing or being dis-

placed as a result of a store closing, the employee will be entitled to severance pay.

[15] One (1) week of base pay for each two (2) years of service up to a maximum of five (5) weeks pay.

All monies due employees shall be paid in a lump sum upon termination.

B. An employee who is terminated and is eligible for severance pay, and accepts severance pay forfeits his seniority and has no recall rights. However, an employee may elect a voluntary layoff not to exceed one (1) year. If the employee accepts layoff, he may any time after a ninety (90) day period elect to take his severance pay and lose his seniority rights.

C. An employee shall be disqualified for severance pay in the event the employee:

1. Refuses a transfer in his seniority area.
2. Voluntarily terminates employment.

* * * * *

GRIEVANCE FORM

UNITED FOOD & COMMERCIAL WORKERS
Union Local 626, AFL-CIO No. 2692
9970 OLD AIRPORT HIGHWAY - MONCLOVA, OH 43542-9989
—PHONES—
419-865-2301—Monclova 419-592-3806—Napoleon

WHITE —UNION OFFICE COPY
PINK —STEWARD'S COPY
YELLOW—COMPANY'S COPY
G'ROD —EMPLOYEE COPY

GRIEVANCE FORM

	Name & Classification/ Clock No.
Company with which Grievance Occurred Kroger	Filing Grievance Class Action
Date Grievance Occurred 9-22-84	Grievant's Phone No. (419) 865-2301
Steward's Name n/a	Date Grievance Issued 9-27-84
Department or Store Lima Stores	Business Representative David W. Gelios

Nature of Grievance and Article or Section of Contract Violated The Company violated the entire agreement as well as the successors and assignees language of the preamble, and Article 6. The Company's refusal to comply with the successors agreement will cause irreparable harm

to the Local and membership. We request expedited arbitration before any sale of [sic] subleasing of the Lima stores occurs. We also request that all information demanded be forth coming so that we will be able to effectively process the grievance herein.

Member's Signature .....

1st STEP	2nd STEP	3rd STEP
RESOLVED ☐	RESOLVED ☐	RESOLVED ☐
REFER TO NEXT STEP ☐	REFER TO NEXT STEP ☐	REFER TO NEXT STEP ☐
STEWARD SIGN	STEWARD SIGN	STEWARD SIGN .....
COMPANY SIGN	COMPANY SIGN	COMPANY SIGN .....
DATE	DATE	DATE .....

Company Position Regarding Grievance .....

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When Final Settlement Is Made, Both Company and Union Representative Must Sign Below.

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WESTERN UNION MAILGRAMS

. . .

4195351976 TDBN Toledo OH 249 09-26 0259P EST

PMS James Bos

The Kroger Company RPT DLY MGM, FON 7624000 and
Hand DLR, DLR
1014 Vine St.
Cincinnati Oh 45201

This will confirm our conversation of September 25, 1984 wherein I indicated to you that it was a [sic] Local 626's position that any sale by Kroger's of the stores in Lima, Ohio would be subject to the successors and assignees language. I further indicated to you on behalf of the Local that in the event Kroger's disagreed with the Local's interpretation, that the Local would be willing to expedite the matter to arbitration.

You indicated that you would report back Kroger's position by the end of business on September 25, 1984. However, to date you have not reported to the Local, Kroger's position. Therefore, the Local assumes that Kroger's does not intend to comply with the terms of the collective bargaining agreement.

In the event we do not receive word from Kroger's within forty eight (48) hours of this telegram, we will assume that Krogers intends to sell, lease or otherwise dispose of the stores in Lima, Ohio in violation of the successors and assignees language of the current agreement.

Therefore, since the stores are effectively closed, please consider this telegram as a grievance protesting Kroger's right to sell, lease or otherwise dispose of the Lima stores

in violation of the successors and asignees language of the contract as well as the contract in its entirety.

I would further point out, as I indicated to you on the phone, that failure to receive some notification from Kroger's will require the Local to seek the appropriate relief in federal court.

Ted Iorio
Gallon, Kalniz & Iorio Company, LPA

. . .

4195351976 TDBN Toledo OH 276 09-26 0311P EST

PMS James Bos

The Kroger Company RPT DLY MBM, FOM 7624000
AND HAND DLR, DLR
1014 Vine St.
Cincinnati OH 45201

In order to process the grivance forwarded to you by mailgram, it is necessary in order to accurately process this grievance to gain the following information from the Kroger Company:

1. Does Kroger's own all three of the stores under contract with Local 626 in Lima, Ohio area or do they lease stores?

2. If any of the stores are leased, could you provide a copy of the lease Kroger's has with the lessor.

3. Is Kroger's currently in the process of attempting to sell any stores that they may own or sub-lease stores that they may be currently leasing?

4. Has Kroger's advised potential buyers and/or leassees of the successors and assignees language of the current agreement?

5. Does Kroger's intend to sell or otherwise lease the stores in question if the potential buyers and/or leasee [sic] refuses to adopt terms of the current collective bargaining agreement?

6. If there are any purchase and sale agreements or other documents that have been entered into by Kroger's with the potential buyer and/or leasee [sic], I would request a copy to be forwarded to the undersigned.

I trust that you will supply the information immediately and if I do not receive the same or receive a response from Kroger within forty eight (48) hours of the date of this telegram we will assume that Krogers refuses to supply the information requested above. Furthermore, if Krogers wishes to meet over the grievance filed herein, the Local is prepared to meet at any agreeable time and place.

I look forward to receipt of the information and word from Krogers regarding any meeting over the grievance at hand.

David Gelios
U.S.C.W [sic] Local 626

. . .

17 Cincinnati, OH 03:26 EST 09/29/84
PMS Ted Iorio, Esq.
Gallon, Kalniz & Ioria [sic] Co., LPA
3161 North Republic Boulevard
Toledo, OH 43615

RE: Local 626's Telegrams of 9/26/84

Dear Mr. Iorio:

As promised, this is the Company's response to your telegram of September 26, which was referred to me by Jim Bos who has been out of the office on other business.

Neither the Local 626-Kroger bargaining agreement nor national labor relations policy, as defined by the courts and the NLRB, requires the Company to impose upon the purchaser(s) of the three Lima store meat departments an obligation to (A) recognize the union/ (B) adopt the bargaining agreement or (C) hire certain employees. The parties' agreement exclusively vests in the Company broad managerial discretion regarding the direction and control of store operations, including where and when stores will be opened/closed. Indeed, the agreement expressly prescribes the final, binding and orderly exercise of employee rights and benefits upon "store closing", leaving unfettered Company decisions regarding the subsequent sale of these stores as well as the labor relations/personnel decisions of any further purchaser(s) of these stores.

In view of the above there is no "grievance" cognizable under our agreement. Your bald demands that we impose upon any prospective purchaser recognition of the Union, adoption of our bargaining agreement and/or the hiring of employees are beyond the reach of our bargaining agreement and, therefore, not arbitrable. The Union ap-

pears to have conceded as much by requesting a meeting on October 4 to discuss the impact of the September 22 closing of the three Lima meat departments. Of course, the Company has agreed to meet and discuss the Union's proposals/demands at that time.

(In passing, for three months this Union was repeatedly invited to participate in bargaining related to the decision the decision [sic] to close the three Lima stores. Though fully advised of what was needed in order to keep these unprofitable stores open and secure the jobs of its members the Union chose to ignore the Company's constructive requests for relief under the parties' bargaining agreement. These stores are now closed, and the Union's recent interest in this matter is truly belated.)

Lastly, the Union in its second telegram of September 26 requested certain information "in order to process the grievance". For the reasons stated above, the Company has no obligation to submit information for this purpose.

However, in view of the Union's demands for impact bargaining and the possible relevance such information might have we are furnishing the following. The Company owns the store located on Cable Road in Lima; the other two Lima stores are leased. The Company is attempting to sell these stores, as the Union has been advised, but as of this time no stores have been sold. Each buyer will be provided a copy of the Local 626-Kroger agreement although there is no obligation upon the Company to do so. Finally, we have no obligation or right to intrude upon the labor relations/personnel policies of these prospective buyers, but we will identify the eventual buyer(s) when these stores have been sold.

Very truly yours,

John M. Flynn